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NO. 85-1033

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOHN J. KELLY, CONNECTICUT
CHIEF STATE'S ATTORNEY, ET AL.,

Petitioner,

V.

CAROLYN ROBINSON,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF OF AMICI CURIAE, ALASKA, CALIFORNIA, FLORIDA, IDAHO, ILLINOIS, INDIANA, IOWA, KENTUCKY, LOUISIANA, MARYLAND, MICHIGAN, MINNESOTA, MISSOURI, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, OREGON, PENNSYLVANIA, RHODE ISLAND, UTAH, VERMONT, WASHINGTON, WISCONSIN, AND WYOMING*

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BRIEF OF AMICI CURIAE, IN SUPPORT OF PETITION FOR CERTIORARI

INTEREST OF AMICI CURIAE

Amici curiae are states, each of which uses different penal sanctions for different cases to enforce its criminal laws. Amici use sentences that include probation, with conditions tailored to the offense and offender. Amici's penal sanctions include, in many cases, requirements that offenders pay sums of money corresponding to victims' losses, as a condition of probation or through other judicial mechanisms.

The characterization of such a condition of probation in such a case as a "debt" dischargeable in bankruptcy is erroneous. It fails to recognize the important function that such sanctions serve in carrying out penal goals of deterrence, prevention, rehabilitation and proportional justice. Amici would be deprived of the flexibility to use the best available penal sanction to fit major categories of crimes, and would probably be forced into the use of sentences of incarceration when that sanction would otherwise be unnecessary, if the result in the court of appeals were to be considered correct.

STATEMENT OF THE CASE

Amici adopt the statement of the case made by Petitioner, the Chief State's Attorney for the State of Connecticut.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THE DECISIONS OF SEVERAL OTHER COURTS OF APPEALS.

The Second Circuit's decision below conflicts with the holdings in *United States v. Carson*, 669 F.2d 216 (5th Cir. 1982), *United States v. Alexander*, 743 F.2d 472 (7th Cir. 1984), and *Barnette v. Evans*, 673 F.2d 1250 (11th Cir. 1982).[1]

This conflict is not a minor or tolerable one. In the States to which it is applicable, the decision below may frustrate victim restitution programs.[2] Furthermore, for reasons given in Part II of this Brief, the decision will have widespread results in other States.[3]

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1 The Second Circuit purported to distinguish these decisions on the ground that they assertedly involved non-dischargeable post-discharge debts. The assertion is inaccurate for the reasons given in Petition for Certiorari at pt. I. Further, none of these decisions admits of such a distinction; all reason that criminal restitution is simply not dischargeable under the Bankruptcy Act. *Id.*

Finally, the Second Circuit itself recognized the inconsistency. It flatly stated, "*We disagree with the reasoning and conclusions of* the [majority] line of cases." Slip op. at 9 (emphasis added).

2 The concurring opinion, below, states flatly that the decision will "stultify and render useless" such programs, Slip op. at 30, and called it an "unfortunate loophole." *Id.*

3 *See infra* notes 4-6 and accompanying text.

II. THE DECISION BELOW PRESENTS SUBSTANTIAL QUESTIONS OF FEDERAL LAW THAT HAVE NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

There have been a number of decisions concerning the issue raised by the case at bar. Virtually all are contrary to the court of appeals' decision in this case, although the court correctly cited one district court decision that supported its result.[4]

The effect of the decision below will be widespread and serious. It may leave victim restitution programs in many States in limbo. Judges who would otherwise use probation conditions as a substitute for incarceration will not know whether this sentence will be valid. That result would mean that the State could not use probation as an effective sanction to enforce its penal laws, and, therefore, many conscientious judges may be expected to use other sanctions instead, including incarceration.[5] Throughout the United States, effective and diligent attorneys will naturally respond to the decision by seeking discharge of conditions of probation, thereby creating conflicts between bankruptcy and criminal courts. Inconsistencies in result, from district to district and even from court to court, will be frequent. Since the inconsistencies will not reflect rationally cognizable differences in underlying cases, the penal law itself may be brought into disrepute. That state of affairs will continue until this Court resolves the issue.

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4 The court, below, correctly stated that "[a] majority of the courts that have considered this issue have . . . held . . . criminal restitution . . . not a debt . . . ." Slip op. at 9. The majority of cases follow *In re Pellegrino*, 42 B.R. 129 (Bankr. D. Conn. 1984), with which the lower court stated it disagreed. *Id.* It said, "The lone exception, so far as we are aware, is *In re Brown*, 39 B.R. 820 (Bankr. M.D. Tenn. 1984)." *Id.* at 12.

5 *See In re Pellegrino*, *supra* note 4, at 134.

A. There is a Substantial Question Whether the Condition of Probation at Issue in This Case, Which is a Penal Sanction Used by the State to Carry Out Its Policies of Deterrence, Incapacitation, Rehabilitation, and Proportional Justice, Was Correctly Characterized Below as a Mere Civil "Debt."

At one time, felonies were uniformly addressed by very severe penalties. That approach has given way, today, to more flexible sanctions. [6] Incarceration was used as an early substitute for capital punishment, and, later, probation upon specified conditions was used as an alternative to incarceration. All of these sanctions, however, share common characteristics. They are attempts by the State to carry out its policies of deterrence, prevention, rehabilitation, and proportional justice. [7]

Conditions of probation play an important part in the achievement of these policy goals. Probation for a less serious offense, for example, may carry few conditions other than standardized ones such as reporting and nonviolation of the law. Probation for more serious offenses, on the other hand, may incorporate requirements that force the probationer to confront and appreciate the effects of his criminal act. Thus probation may be conditioned upon a brief period of incarceration. Alternatively, it may be made a condition of probation that the offender perform a certain number of hours of community service. Requiring a drunk driver to assist in hospital emergency rooms, for example, may serve policies of general deterrence, specific deterrence, rehabilitation and proportional justice by forcing the offender to confront the consequences of his offense.

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6 *Cf. Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (recognizing a "variety of flexible techniques—probation, parole, work furloughs, to name a few"—that are available in non-capital cases). Probation with restitution conditions is a part of that flexible set of sanctions.

7 *See generally* S. KADISH, S. SCHULHOFER, & M. PAULSEN, CRIMINAL LAW AND ITS PROCESSES ch. 3 (4th ed. 1983).

1. In many cases, conditions of probation incorporating monetary payments are the superior means of accomplishing the State's penal purposes underlying the criminal law. The State's penal purposes may best be served, in many cases, by probation conditions requiring monetary payments to victims. Such a penal sanction works because it is a deterrent both general and specific; because it has rehabilitative effects; and because it communicates both to the victim and to the society at large that justice has been done. In fact, such victim payment conditions have been supported on the precise ground that they are highly effective in forcing the offender to confront, in the most tangible and measurable way, the harmful consequences of his offense.[8] As such, these conditions may be the best available penal sanctions in some kinds of cases.

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8 For an excellent discussion, see Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 HARV. L. REV. 932 (1984).

> [T]he criminal law's main goals are rehabilitation, deterrence, and retribution; consequently, criminal law focuses on punishing and reforming .... Although restitution may appear to share with the civil law the aim of compensation, close examination reveals that its principal goal is not its ability to make victims whole, but rather its utility as a corrective device.

Id. at 937.

Expert authorities express the view that only a minority of victims are benefitted directly by restitution. A condition requiring restitution depends upon apprehension, conviction and offender solvency; logically, therefore, restitution cannot be the basis of a systematic effort to compensate victims injured by persons who after all, more frequently are *not* apprehended. If general compensation is the goal, victim compensation programs of a quasi-insurance type can accomplish what restitution cannot. *See* Edelhertz, *Legal and Operational Issues in the Implementation of Restitution in the Criminal Justice System*, in RESTITUTION IN CRIMINAL JUSTICE 63-64 (J. Hudson & B. Galway eds. 1977).

Some experts therefore conclude, often in very definite terms, that a restitution program is actually likely to prove unsuccessful if viewed as having the goal of compensation, and that it will work best if viewed, instead, as effecting a penal sanction having as its goal the reform of the offender. For example, Edelhertz says:

The Court of Appeals gave no consideration to these penal purposes of the penal sanction at issue. Those penal purposes should be addressed by the grant of certiorari by this Court. Victim payment programs administered as conditions of probation are important penal sanctions and are worth saving. However, the concurring judge, below, was certainly correct when he stated that this decision will "stultify and render useless" such programs "*as a means of punishing persons convicted of felonies.*" [9]

2. The lower court confused the law by equating the equitable remedy of civil "restitution" with the entirely different criminal sanction of victim "restitution." The Court below erroneously reasoned that victim "restitution" payments required as a condition of probation by a criminal court are equivalent to, and a subclass of, equitable "restitution" remedies of the kind

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> [T]he [restitution] programs that are actually established invariably focus on correction or rehabilitation of offenders. *No restitution program has come to my attention that had the delivery of benefits to victims as a primary or even very important operational goal.*

Id. While amici curiae may retain differing views of the subject, and would certainly regard as beneficial those compensation effects actually resulting to victims, this conclusion of the expert authorities conflicts sharply with the statements of the court below and further demonstrates the substantial nature of the questions presented here.

The rehabilitative effects of restitution are borne out by empirical research. Challeen & Heinlen, *The Win-Onus Restitution Program*, in OFFENDER RESTITUTION IN THEORY AND ACTION 151, 155 (B. Galway & J. Hudson eds. 1978) (demonstrating lower recidivism rate for offenders who participated in restitution program). *See also* Note, *Victim Impact Statements and Restitution: Making the Punishment Fit the Victim*, 50 BROOKLYN L. REV. 301, 312-13 (1984).

9 Slip op. at 30 (emphasis added). The concurring judge's recognition that restitutive payments are not primarily compensatory, but rather are a "means of punishing persons convicted of felonies," supports the conclusion that they are a penal sanction rather than a debt.

that might be ordered by a civil court.[10] This reasoning was superficial and serves only to confuse the issues. There is in reality no relationship between equitable "restitution" and victim "restitution" as a penal sanction, except for the name.

Equitable restitution is a remedy distinguishable from compensatory damages, punitive damages, and specific performance, in that it influences the way in which a civil court may compute the civil measure of recovery upon which the plaintiff may levy execution. [11] Probation conditions are entirely different, may be measured in ways unrelated to equitable measures, may not provide for full payment of the victim's loss, may take into account the wage earnings of the offender, may involve a schedule tailored to his abilities, and, in short, may be tailored to serve the objectives of a criminal, penal sanction, rather than the rigidly defined individual remedy that a private creditor would have in a civil court in collecting a "debt." [12]

3. A penal sanction such as a prison term, community service, or a condition of probation requiring payment, may

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10 The court said, for example, that it saw no indication "that Congress intended some rights to restitution but not others to be within the definition of claim." Slip op. at 14. This reasoning fits civil restitution, in which there is a "claim," but it does not fit a judgment of probation, to which the victim is not a party and obviously does not present a "claim."

11 *Cf.* K. PARKER, MODERN JUDICIAL REMEDIES 12, 27-35 (1975).

12 In fact, Robinson was required to pay $100.00 per month. The total amount she would pay over the five-year probationary period was $5,800.00, and this amount would be considerably less than the $9,932.95 stolen by her. *See* Petition for Certiorari, Statement of the Case.

This flexible probation order is consistent with the use of the penal sanction. Conn. Gen. Stat. Ann. sec. 53a-30(a)(4) (West Supp. 1985) empowers the trial judge to take account of the offender's circumstances and ability "to pay" and gives him broad discretion in doing so.

informally be characterized as a "debt to society," but it is not thereby transformed into a debt dischargeable in bankruptcy. In its reasoning, the Court of Appeals considered only that authority under the Bankruptcy Act that requires the "broadest possible" interpretation of "debt," and the Court failed to consider that even a broad definition has limits at some point. For example, a person sentenced to a prison term is accurately (if informally) said to have a "debt" to society, but it would make no sense to regard that sentence of years in prison as a "debt" dischargeable in bankruptcy.

Similarly, community service might loosely be called a "debt to society." In the present case, for example, Carolyn Robinson might as appropriately have been sentenced to spend several hundred hours of community service to the benefit of public welfare recipients, and that obligation (in theory) could be made to be the precise equivalent, in effort and in effect, of the probation condition in the present case, yet it clearly would not be a "debt" for discharge purposes.[13] Likewise, some States would require a person in Robinson's position to pay a penalty into a common fund for general victim compensation; such a payment would be, metaphorically, a "debt" to society, but it would obviously not be a debt subject to bankruptcy discharge.[13a]

Each of these sentences would share, in common with the condition of probation at issue here, the characteristics of a

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13 Such a sentence, however, would be inferior, in many instances, to probation with a condition requiring restitution. For example, it often would interfere with the duties of the offender in keeping custody of his or her children.

13a Criminal restitution is "a constructive alternative to the severity of imprisonment and the leniency of probation." Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 HARV. L. REV. 931, 932 (1984). "The sanction can take a variety of forms. A court may order an offender to pay money directly to the victim, to participate in a work program in which a portion of his salary is paid to the victim, to render services to the victim, or to work for the community in lieu of repayment of the victim." *Id.* at 933.

penal sanction, designed to further goals of deterrence, prevention, rehabilitation and proportional justice. The use of a simplistic definition of "debt," such as that used by the court below, would undermine the State's criminal justice system by precluding the use of what are not debts at all but penal sanctions. This result would be equally irrational in these examples and in the case at bar. [14]

Connecticut's primary goal in this case is not the collection of $9,932.95 as a civil "debt." Instead, Connecticut seeks to reduce theft in the future, by Carolyn Robinson and others, by vigorous prosecution followed by appropriate sanctions that carry out the State's policies of deterrence, prevention, rehabilitation, and justice. That result cannot follow if Robinson keeps the money she has stolen and has the sanction of the law in doing so. The $9,932.95 is a necessary but incidental consideration in

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14 The court of appeals suggested, erroneously, that the State could prevent this result by objecting to discharge.

That solution would require that the State reassign large numbers of assistant district attorneys to serve, instead, as bankruptcy lawyers. "Objecting" to discharge, and doing so effectively, is a complex procedure, equivalent to a civil suit. It requires a complaint; attendance at creditors' and various other pretrial meetings; discovery; a pretrial order; and, as in any other civil suit, proof by the objecting party of its grounds at a trial. It is possible that the State could be denied the benefits of offensive collateral estoppel, *see Haring v. Prosise*, 103 S.Ct. 2368 (1983), and therefore it could be faced with the requirement that it prove the elements of the crime all over again.

Furthermore, objecting to discharge would be ineffective if the offense did not fit the categories of crimes for which discharge can be prevented. For example a person who committed a reckless assault and caused severe personal injuries to another individual would be immune from objection and could avoid a sentence of restitution by bankruptcy.

Finally, the "objection" procedure assumes a need for case-by-case determination of the existence of the underlying crime. That effort is unnecessary, and Congress certainly would not have intended to require it, when the entire category of sentences sought to be discharged has already, by definition, been judicially determined to involve criminal offenses.

that larger purpose, for which Connecticut would undoubtedly be willing to spend much more than $9,932.95. The decision below presents substantial questions by its denigration of that larger purpose.

B. The Decision Below Presents Substantial Questions Concerning Whether the "Fresh Start" Policy of the Bankruptcy Act is Served by Forcing Connecticut into a Situation in Which It Has No Alternative But to Incarcerate the Bankrupt.

The basic policy of the Bankruptcy Act is to provide a "fresh start" to persons who have, through inadvertence, become overextended.[15] "The Bankruptcy laws are not a haven for criminal offenders, but are designed to give relief from financial overextension."[16] The decision below will defeat that very policy of "fresh start" by forcing Connecticut and other States into harsher alternatives.

Connecticut simply cannot surrender its interest in deterrence, prevention, rehabilitation and proportional justice. Occasional miscarriages in individual cases, in which these goals may fail of achievement, might be tolerable; but systematic failures, in which major categories of offenders achieve virtually complete immunity from any penalties whatever upon conviction, are not. Thus the question raised by the decision below, and it is a substantial one, is: What is Connecticut to do in the cases of future Carolyn Robinsons?

If deprived of the ability to use conditions of probation to achieve its valid penal objectives, the State of Connecticut may be forced into a situation in which it has no alternative but to

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15 *Perez v. Campbell*, 402 U.S. 637 (1971) (expressing fresh start doctrine); *see also* 3 L. KING, COLLIER ON BANKRUPTCY para. 525.02 (15th ed. 1985).

16 *In re Pellegrino*, *supra* note 4, at 134.

incarcerate persons in Carolyn Robinson's position. The resulting deprivation of freedom may be more harsh for her and may require the State to make arrangements for her dependents that will be inferior to allowing her to keep them while on probation. In addition, the alternatives may be less appropriate to the achievement of the State's legitimate penal objectives than probation with appropriate conditions. Nevertheless, the State's interest in the integrity of its penal sanction is so fundamental that it will be forced to use more harsh, and less useful, alternatives if deprived of the middle ground by decisions such as that of the court below.[17] This result is inconsistent with the "fresh start" policy underlying the bankruptcy act.

CONCLUSION

The decision below conflicts with the approach taken in decisions of other courts of appeals. It presents substantial questions that have not been, but should be, decided by this court. The writ of certiorari should be granted.

Respectfully submitted,

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17 The holding below transforms what Respondent has done into the perfect crime. Connecticut clearly cannot afford to foster an atmosphere in which welfare theft, followed by conviction coupled with bankruptcy discharge, is perceived as the perfect crime. It will have no choice, if that happens, but to resort to the more severe and less appropriate sanction of imprisonment.